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Torts - Agency - Liability of Architect For Failure To Suervise Work of Sub-Contractor

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another material man.[14] The same appears true with respect to those who perform labor for subcontractors as contrasted with those who perform labor for material men.[15] Though the protection afforded claimants under the private contracts security statutes differs to some extent from that under the public contracts statutes,[16] the instant case furnishes strong persuasive authority for the application of the same rule of classification in cases involving private building contracts.

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TORTS — AGENCY — LIABILITY OF ARCHITECT FOR FAILURE TO SUPERVISE WORK OF SUB-CONTRACTOR

Plaintiff brought a tort action to recover damages for the death of her husband, an employee of a plumbing sub-contractor.

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decision would have gone the other way. The question was presented again in the case of Frank v. Waters, 162 La. 255, 110 So. 413 (1926). This time the applicable statute was La. Acts 1922, No. 139, which provided for the filing of a claim by "Every person having a claim against the undertaker, contractor, master mechanic or contracting engineer. . . ." The court gave no lien to a material man who had supplied a subcontractor, saying that the legislature had had both the *Ketteringham* holding and dicta before it when it chose language of the type in the 1914 statute over that of the 1916 statute and so must have intended that the interpretation placed on the 1914 language be followed. Jeter v. Lyon, 8 La. App. 115 (1928) followed the *Waters* case. The latest case dealing with the question of whether a material man who supplies a subcontractor has a lien is Dixie Bldg. Material Co. v. Massachusetts Bonding and Insurance Co., 167 La. 399, 119 So. 405 (1928). That case held that under La. Acts 1926, No. 298, such a material man was afforded a lien. The court relied on Section 1 of the act and not on language similar to that used in the above cases. However, the wording of Section 2 of the act provides for the filing of a claim by "every person having a claim against the . . . subcontractor." In light of these decisions it would seem that a furnisher of material to a subcontractor is afforded a lien under the present statutes. In the first place, Section 1 of the present act is very similar to the first section of La. Acts 1926, No. 298, under which a lien was granted. Secondly, the second section of the present act contains provision for the filing of a claim by "every person having a claim against the subcontractor." LA. R.S. 9:4802 (1950).

14. In the case of Patterson v. Lumberman's Supply Co., 167 So. 471 (La. App. 1936), it was held that the supplier of a material man had no lien under La. Acts 1926, No. 298. The court relied on Sections 1 and 12 of that act and the *stricti juris* rule to reach that conclusion. There seems to be no wording in the present statutes which would justify a departure from this result.

15. The same statutes which provide protection for those who furnish material also provide protection for those who furnish labor. Since the courts have refused protection to material men who supply other material men under these statutes it would appear that they would reach the same result with respect to laborers who perform labor for material men.

16. It is beyond the scope of this paper to go into a detailed comparison of the public and private building contract security laws. Under both the claimant may, in certain circumstances, be protected by the contractor's bond and have a right of action against the governing authority or private owner, as the case may be. However, a claimant under a public building contract never receives a lien on the work, while in certain instances a private contract claimant does have a lien on the building.

He died as a result of a boiler explosion which occurred during the sub-contractor's negligent installation of a hot water system in a new hospital building. Recovery was sought against the architects who designed the building and their insurers.[1] By their contract with the owner of the hospital, the architects had undertaken to provide "adequate supervision of the execution of the work to reasonably insure strict conformity with the working drawings, specifications and other contract documents."[2] Plaintiff alleged that the architects had been guilty of negligence in failing properly to supervise installation of the hot water system.[3] The trial court rendered judgment against the architects and their insurers and the court of appeal affirmed.[4] On certiorari to the Supreme Court of Louisiana, *held*, reversed.[5] The obligation to supervise the execution of the work, based on the contract between the architects and the owner of the hospital, imposed no duty on the architects towards the deceased to know that the boiler was being installed and to inspect the installation while in progress and before testing.[6] *Day v. National U. S. Radiator Corp.*, 128 So.2d 660 (La. 1961).

1. Plaintiff also joined as defendants several other persons, firms, corporations, and their insurers. The trial court rendered judgment in favor of all defendants except the architects and their insurers. This result was affirmed by the court of appeal. Day v. National U.S. Radiator Corp., 117 So.2d 104 (La. App. 1959).

2. Day v. National U.S. Radiator Corp., 128 So.2d 660, 662 (La. 1961).

3. Plaintiff also alleged that the architects had been guilty of negligence in another particular, in approving the sub-contractor's "shop drawing" of certain equipment without provision for a pressure relief valve on the boiler which subsequently exploded. The Supreme Court concluded that this allegation was not supported by the evidence.

4. Day v. National U.S. Radiator Corp., 117 So.2d 104 (La. App. 1959). The court of appeal based its decision that the architects were liable on a determination that the architects owed a duty of reasonable care toward the building contractor and his employees, under the circumstances as they existed. The court then applied the doctrine of res ipsa loquitur and found that the evidence established that the architects were guilty of negligence in failing to supervise the work properly and in approving the sub-contractor's "shop drawing" of equipment without provision for a pressure relief valve on the boiler which later exploded.

5. Application for rehearing denied April 24, 1961.

6. The court rejected plaintiff's contention that the doctrine of res ipsa loquitur was applicable to the instant case. This result was reached on the basis that all facts and circumstances surrounding the accident appeared in evidence. It is submitted that this result is correct. However, the implication of the conclusion that the doctrine was inapplicable because all facts and circumstances surrounding the accident were in evidence is that the doctrine applies only in the absence of other evidence. It is submitted that to base the determination of the applicability of the doctrine only upon such presence or absence of evidence is unsound in that such a practice could well lead to the suppression of evidence by plaintiffs anxious to benefit by the doctrine. See Malone, *Res Ipsa Loquitur*, 4 LOUISIANA LAW REVIEW 70, 93 (1941). It would seem that a better view than that adopted by the court would have been that res ipsa loquitur was inapplicable for the reason that the doctrine should not be applied until a duty to plaintiff has been found. Malone, *supra* at 74. As the court specifically found that defendant architects owed no

The instant case involves the question of the duty of an architect, as agent of the owner, to persons other than the owner. An agent may incur liability to third persons — persons other than his principal — for positive misconduct creating a peril, despite the fact that he is acting for the principal.[7] He may also be held liable to third persons for his failure to take affirmative steps to remove a peril created by another, *if* protection of such third persons was one of the purposes of his undertaking.[8] The reason for imposing liability in such cases has been said to be that, had the agent not undertaken to act in the transaction, it might reasonably be assumed that the principal himself would have acted or would have secured another, more reliable agent to act.[9] Thus, an architect or other agent who undertook to supervise *for the protection of workers* would be liable for failure to do so resulting in death or injury to a worker.[10] In addition, liability has been imposed where, under a general duty of supervision, an architect has actually inspected a building under construction and thereby acquired or should have acquired knowledge of an imminent danger to workers, yet failed to see that the danger did not result in injury to those imperilled.[11] On the other hand, where protection of workers was foreign to the purpose of the undertaking, failure to act so as to protect them would not result in liability.[12]

The crucial matter for the court's determination in the instant case concerned the scope and extent of the architects' duty of supervision and inspection under the contract terms, i.e., was this obligation of such a nature that the architects should be

duty to deceased, it follows that, for this reason, res ipsa loquitur should not be applied to the case.

7. Jackson v. Schmidt, 14 La. Ann. 806 (1859). See RESTATEMENT (SECOND), AGENCY § 350 (1958); PROSSER, TORTS 517 (2d ed. 1955). For a full discussion of the liability of an agent to third persons for "nonfeasance" in the performance of a duty owed to his prinicpal, see Note, 21 LOUISIANA LAW REVIEW 795 (1961).

8. Adams v. Fidelity and Casualty Co., 107 So.2d 496 (La. App. 1958). *Cf.* Metildi v. State, 177 Misc. 179, 30 N.Y.S.2d 168 (Ct. Cl. 1941). See Clinton v. Boehm, 139 App. Div. 73, 124 N.Y. Supp. 789 (1910). It should be noted that even in those cases where the principal is held to be under a duty to third persons, if he does not delegate such duty to his agent, the agent cannot, of course, be held liable thereunder. See RESTATEMENT (SECOND), AGENCY § 354 (1958); PROSSER, TORTS 514 (2d ed. 1955).

9. Seavey, *The Liability of an Agent in Tort*, 1 So. L.Q. 16, 33 (1916). See RESTATEMENT (SECOND), AGENCY § 354, comment *a* (1958).

10. Erhart v. Hummonds, 334 S.W.2d 869 (Ark. 1960). See Adams v. Fidelity and Casualty Co., 107 So.2d 496 (La. App. 1958); Metildi v. State, 177 Misc. 179, 30 N.Y.S.2d 168 (Ct. Cl. 1941) (state labor law imposed upon defendant the duty of inspecting for the purpose of protecting workers on the job).

11. Paxton v. Alameda County, 119 Cal. App.2d 393, 259 P.2d 934 (1953).

12. See Clinton v. Boehm, 139 App. Div. 73, 124 N.Y. Supp. 789 (1910).

held liable for the death of an employee of a sub-contractor, which occurred during the sub-contractor's installation and testing of a hot water system in a building designed by the architects. In answering this question, the court looked to the specific terms of the contract under which the architects' agency arose, and concluded that they had no control over the method by which the contractors performed their work.[13] Thus they owed no duty to deceased to know that the boiler was being installed and to inspect the installation while in progress and before testing. The court stated that the only purpose of the contract provisions for supervision by the architects was to assure generally that the owner secured the building for which it had contracted.[14] Having thus disposed of the case on the basis of there having been no duty owed deceased by the architects, any further question of their negligence was necessarily pretermitted.

The instant case, in addition to requiring for its decision interpretation of certain contract provisions, involved broader questions of policy, as to what liability agents in the position of the defendant architects incur through arrangements by which they undertake to supervise the execution of work. Normally it would be expected that an owner would not impose upon an architect a duty of making an inspection of a type adequate to protect workers unless the owner would himself be liable for failure to so inspect. An owner normally owes no duty to protect a sub-contractor's workers against the sub-contractor's own carelessness,[15] and therefore it would not be expected that he would contract with an architect to inspect so as to protect them. The usual purpose of an architect's undertaking is to assure that the owner ultimately receives a building which is suitable for his purposes and which conforms to the specifications.[16] Periodic supervision of the execution of the work by the architect provides a practical means of assuring that this purpose is achieved.

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13. Day v. National U.S. Radiator Corp., 128 So.2d 660, 666 (La. 1961).
14. *Id.* at 666.
15. Metzinger v. New Orleans Board of Trade, Ltd., 120 La. 124, 44 So. 1007 (1907); Humpton v. Unterkircher, 97 Iowa 509, 66 N.W. 776 (1896).
16. Humpton v. Unterkircher, 97 Iowa 509, 66 N.W. 776 (1896); Garden City Floral Co. v. Hunt, 126 Mont. 537, 255 P.2d 352 (1953). An architect who negligently performs his undertaking may thereby incur liability to the owner or even to later occupants of the building. See Clemens v. Benzinger, 211 App. Div. 586, 207 N.Y. Supp. 539 (1925).